

1 MR. DAVIS: Exactly, which is why we felt --

2 THE COURT: Okay.

3 MR. DAVIS: -- actually Mr. Jordan felt it necessary
4 to put the parenthetical in to make sure that we understood
5 that that was our interpretation of what those numbers are.

6 THE COURT: Okay.

7 MR. DAVIS: The other thing I want to point out is
8 that this does not include natural resource damages. And the
9 reason it doesn't include that is natural resource damages are
10 not affected by the net present value and indirect issue in the
11 way the response costs are. So if you're inclined to award
12 them the full amount of \$80 million that they're looking for,
13 if you used one of these numbers, you'd need to add \$80 million
14 to that number to correct, come up with a correct number for
15 the estimated amount.

16 I'd also, there's a footnote at the bottom that notes
17 that we have converted the numbers to a 2006 base year, which
18 we've used as a proxy for the filing of the petition date. We
19 have not included oversight for the State and Tribe, for the
20 reasons that I mentioned a minute ago, and we have not included
21 post-petition interest on past costs.

22 Now, to understand how this chart works and the way
23 these numbers work, you really, you first have to choose the
24 remedy, then you need to apply the discount. And of course,
25 there's an issue as to the discount rate. But the first four

1 scenarios, of course, are the U.S. remedy, the comprehensive
2 remedy that Ms. MacDonald talked about. The next four are the
3 Debtor remedy, which is really the EPA's remedy as proposed in
4 the Interim Record of Decision.

5 Then the next column illustrates what happens when
6 you take that remedy and either discount it according to the
7 United States discount rate, the low two, three percent rate,
8 or the Debtor's discount rate of about seven percent.

9 The final column is the application of either adding
10 indirects or not adding indirects. As you recall, indirects is
11 like 33 percent that simply gets added to the total response
12 cost figure. So after you take the remedy, you bring it back
13 to net present value, you add a percentage for indirect, and
14 you come up with the final number.

15 And if you look at the first two scenarios, what
16 we've done is we've used the United States' remedy, United
17 States' discount rate. In scenario number two, we've not added
18 indirects, and scenario number one, we have added indirects.
19 And as you see, that would appear to suggest that the indirect
20 cost issue is a \$100 million issue.

21 The problem with that analysis is if you look at Item
22 Number 7, or Scenario Number 7, we have the Debtor remedy,
23 Debtor net present value, and we add indirects. Compare that
24 to Number 8, which is the Debtor's remedy, the Debtor's net
25 present value, and no indirects. You see there's only about a

1 \$26 million difference in between those two scenarios,
2 illustrating the point that until you apply the remedy and
3 determine the net present value, you don't really know how much
4 of an issue or how large a dollar issue indirect costs really
5 represent. And so what --

6 THE COURT: And tell me again what you think -- what
7 are indirect costs.

8 MR. DAVIS: Indirect costs are basically EPA
9 overhead. Mr. Steinway will address that at great length.

10 THE COURT: Okay. These are the costs, I mean,
11 this -- so the Number 7, that's your view of the indirects that
12 the EPA has? I mean, aren't the indirect costs the same,
13 regardless of how much their damages are?

14 MR. DAVIS: No. Indirect costs vary as a direct
15 percentage of the amount of response costs.

16 THE COURT: Okay. So there is a, there is some legal
17 principle somewhere in environmental law that says that they're
18 entitled to indirect costs of a certain percentage.

19 MR. DAVIS: Under certain circumstances.

20 THE COURT: Okay, good.

21 MR. DAVIS: And it is a percentage, so it varies,
22 again, with the amount of the remedy that you find. And then
23 again, depending on how you discount that remedy over time --

24 THE COURT: Right.

25 MR. DAVIS: -- that also affects the percentage.

1 THE COURT: Okay. I understand.

2 MR. DAVIS: And that's all I'm trying to accomplish
3 with the chart. You know, if you have questions about that
4 later, I can answer them. But that's all I have right now.
5 I'd like to turn it over to Mr. Steinway.

6 THE COURT: All right. And you're going to sit -- go
7 right ahead. You can sit.

8 MR. STEINWAY: Yes. Dan Steinway. Yes, sir.

9 MR. DAVIS: Would it help the two of you for me to
10 move this?

11 THE COURT: No, I can see him fine.

12 MR. DAVIS: Okay.

13 THE COURT: But you can sit. You don't have to
14 stand. This is not a test.

15 MR. STEINWAY: Thank you, Your Honor. Good morning,
16 Your Honor. Dan Steinway for Debtor, ASARCO, LLC.

17 THE COURT: All right. So are you a piano player
18 also? Or is that just the name?

19 MR. STEINWAY: Just the name, Your Honor.

20 THE COURT: Okay.

21 MR. STEINWAY: Your Honor, the Coeur d'Alene site is
22 indeed very large and an extremely complex site. It includes
23 1500 square miles of mountainous terrain and numerous rivers
24 and streams throughout. The site is basically divided into two
25 specific components. You will hear this morning, Your Honor,

1 about an area called "the Box," and that's this 21-mile square
2 area that has been addressed starting in 1983 as the initial
3 action by EPA in the cleanup under the Superfund program.

4 Inside the Box, Your Honor, you will hear about two
5 different types of cleanups. One is called Operable Unit
6 Number 1, which generally dealt with the populated area inside
7 the Box, and then Operable Unit Number 2, which is generally
8 referred to as the nonpopulated area of the Box.

9 Inside the Box was a smelter which was not owned by
10 ASARCO and is generally being addressed under Operable Unit
11 Number 2. Outside the Box is the area we generally refer to as
12 the 1500 square-mile basin area. And it is basically composed
13 of four different components, the Upper Basin, where the mining
14 activity began, and it's a heavily mountainous terrain area,
15 and the Coeur d'Alene River runs through the area down to Lake
16 Coeur d'Alene, to the main stem of the Coeur d'Alene River,
17 down to this area called the Lower Basin, which is the second
18 component of the overall basin area. The third component is
19 Lake Coeur d'Alene, which is over here, and the fourth
20 component is the Spokane River. And the whole basin area, Your
21 Honor, is referred to as Operable Unit Number 3, which is the
22 subject of this proceeding.

23 We, as the Government has noted, we have recently
24 settled with the Government with respect to the claims inside
25 the 21-square-mile Box area, and that is no longer an issue in

1 this matter.

2 The history of the Coeur d'Alene site is very
3 relevant in this case. And I would like to briefly walk you
4 through that. The Coeur d'Alene site dates back to the late
5 1800s, when mining began in an area generally referred to as
6 Silver Valley. Throughout the years, there was a substantial
7 amount of mining, milling and smelting activity conducted in
8 various portions of the basin area. And in fact, the Coeur
9 d'Alene area has produced through the years a substantial
10 amount of the zinc, lead and silver ores that provided basic
11 raw materials for our nation. The area is a very heavily
12 mineralized area. And indeed, today, mining activity still
13 continues in the Coeur d'Alene area, albeit to a smaller extent
14 than was the case in the past.

15 I think it would be helpful to go through a couple of
16 the key milestones in the history of the site. As I mentioned,
17 in 1983 the Box, the 21-square-mile area, was initially listed
18 on EPA's National Priorities List. And through the years, in
19 the OU1 and OU2 cleanup, activity has gone forward on that
20 portion of the project.

21 In 1998 EPA began to expand its investigation of the
22 Coeur d'Alene area outside the Box and began, as Counsel for
23 the Government said, to conduct the RI/FS, the remedial
24 investigation/feasibility study for the area. The RI is
25 generally the work that is done to characterize the site and do

1 the actual investigatory work, and the FS, the feasibility
2 study, is generally a report that lays out potential options
3 for cleanup based on the study work that is done in the RI.

4 And in 2001 EPA completed the RI/FS for the basin.
5 And indeed, as Counsel for the Government has noted, as part of
6 the feasibility study, one of these six options, which is
7 option number three, was an option called the ecological
8 alternative number three, which is the comprehensive remedy
9 option for the site. And indeed, the Government did express
10 and has expressed throughout the FS process its preference for
11 feasibility study alternative number three, albeit indeed the
12 comprehensive remedy.

13 However, a key action occurred prior to the formal
14 adoption of the feasibility study at the site. In fact, we
15 believe it was an extremely unusual action. In 2001, before
16 the option or the cleanup decision was made, a group called the
17 National Remedy Review Board undertook a review of the RI/FS.
18 And I will talk about the impact of the National Remedy Review
19 Board later on in my remarks. But suffice it to say, Your
20 Honor, the Remedy Review Board is a high level management group
21 at EPA that undertakes reviews of only the most complicated
22 cleanup sites that the agency estimates decisions on.

23 Based on their action, there was an abrupt about-face
24 in what happened in the cleanup. And in 2002, the Interim ROD,
25 which is the agency's Record of Decision, was issued, which was

1 different than the comprehensive cleanup. In summary, because
2 of the Remedy Review Board, EPA decided to instead proceed
3 forward and formally adopted only a specified subset of the
4 cleanup activities that were originally included within the
5 scope of the comprehensive remedy and moved forward under the
6 Interim ROD for 30 years of selected actions.

7 And in fact, in another extremely noteworthy action,
8 in my view, Your Honor, one of the only times in the history of
9 the Superfund program that Congress has gotten involved in a
10 cleanup action in a Superfund program, in 2005, the National
11 Research Council, which is an arm of the National Academy of
12 Sciences, undertook a review and issued a report evaluating the
13 remedies that were being implemented at the Coeur d'Alene site.

14 The National Research Council was directed by
15 Congress to undertake this review basically at the behest of
16 the Idaho congressional delegation, and Congress earmarked
17 approximately \$850,000 to have the National Research Council
18 take a specific study of the mega mining site Coeur d'Alene
19 cleanup decisions and provide very high level scientific advice
20 and recommendations.

21 Going to the bankruptcy proceeding, in July of 2006,
22 the Government initially filed a proof of claim. And the proof
23 of claim included three basic components. The first component
24 was a component for past costs, and indeed, \$326 million for
25 the Interim Record of Decision, or the IROD, as we call it.

1 The second component of the proof of claim was a claim for
2 natural resource damages. And the third component of the proof
3 of claim was a claim for the OU3, the basin cleanup, an
4 undetermined final remedy amount, which was included in the
5 Government's original proof of claim.

6 And after the estimation process moved forward, and
7 the Government filed, in June of 2007, their first expert
8 report, the affirmative report from the Government included,
9 for the very first time, a revised claim of \$2.1 billion for
10 the basin.

11 Additional factual information, Your Honor, has been
12 provided by the Government throughout the course of reviewing
13 and rebutting expert reports, which led the Debtor, in
14 September of 2007, to issue its supplemental report. We have
15 still gotten new additional information being made available to
16 us, as the process has continued.

17 Your Honor, there indeed has been metal contamination
18 from the mining of zinc, lead, and silver ores in the basin.
19 And ASARCO, as has been mentioned this morning, accepts
20 liability for the contamination at the site and recognizes full
21 well the injury that has occurred in the Basin Coeur d'Alene.
22 The key question, though, is how best to address the
23 environmental conditions that now exist in this area in the
24 most effective manner possible, in accordance with the law.

25 A number of key decisions, or a number of key issues

1 have been extensively litigated in the Coeur d'Alene situation
2 throughout many years, and there have been at least five key
3 major decisions. As you've noted, Your Honor, one of the key
4 issues has already been addressed. After a 78-day trial in
5 2003, Judge Lodge, of the Federal District Court for the
6 District of Idaho, issued a very noteworthy decision. And in
7 that decision, Judge Lodge ruled that 22 percent of the costs
8 of the cleanup should be attributable to ASARCO.

9 In his decision, Judge Lodge specifically addressed
10 the key divisibility factors at the site, and we believe he
11 issued a very well-reasoned decision. There was significant
12 testimony from both the Government's experts, as well as
13 ASARCO's experts. And interestingly enough, both experts,
14 using allocation methodologies quite similar in nature, came up
15 with the same number, 22.07 percent versus 22.37 percent. And
16 in fact, in his decision, Judge Lodge specifically referenced
17 the key Fifth Circuit divisibility case, which has been
18 mentioned here, In Re: Bell Petroleum.

19 Having now addressed that factor, we believe there
20 are basically five principal issues remaining for resolution at
21 the Coeur d'Alene site. First and foremost, the key issue is
22 what remedy should be used for the basis for cost estimation in
23 this proceeding? As we noted earlier, EPA has adopted an
24 Interim ROD which specifies 30 years of ongoing work in this
25 area. We accept the Interim ROD as a basis for the estimation,

1 recognizing the fact there are indeed substantial technical
2 problems associated with the implementation of that ROD.

3 We are asking the Court to estimate this claim in
4 accordance with that Interim ROD, which has been adopted by the
5 agency, after full and complete administrative process. We are
6 only asking you to do what the National Gypsum Court did in
7 accepting EPA decisions after a full and complete
8 administrative decision.

9 We very much disagree, however, with the accelerated
10 nature of the implementation of the ROD, of the comprehensive
11 remedy, as proposed by the Government. We do not believe this
12 Court, Your Honor, should place much emphasis at all or weigh
13 the decision of the Government in an advocacy proceeding in
14 this bankruptcy matter, given the fact that the comprehensive
15 remedy has not been finally adopted by EPA through a full and
16 complete administrative process.

17 The Government is asking you to do something very
18 different. They are asking you to estimate a claim that has
19 not been adopted as a formal ROD, Record of Decision, by the
20 EPA. They are asking you to implement a comprehensive remedy
21 in 2008, something now which has never been approved before.
22 This is a complete about-face from what has already been agreed
23 to. Nothing has happened in the basin to justify such an
24 abrupt switch and change in approach.

25 And in fact, in their new proposed comprehensive

1 remedy, this cost, the cost of this remedy is estimated to be
2 approximately \$3.8 billion, and according to EPA's recent
3 calculations, almost \$2.1 billion, a number which we strongly
4 dispute.

5 We think, Your Honor, there are several basic
6 problems with EPA's newfound comprehensive approach. First,
7 that comprehensive remedy, as I mentioned, has not been adopted
8 as a formal Record of Decision.

9 Second, the comprehensive remedy flies specifically
10 in the face of the requirements of the Interim ROD, which
11 requires the carrying out of a specified subset of actions over
12 a 30-year period.

13 Third, the comprehensive remedy flies, is directly at
14 odds with the adaptive management philosophy that has been
15 adopted for this site, which again anticipates a phased-in
16 approach of a cleanup remedy over a 30-year period of time.

17 In fact, Your Honor, this, the Government's proposed
18 comprehensive remedy is clearly at odds with the
19 recommendations of two distinguished audit bodies who have had
20 an opportunity to review the site. First, as I mentioned
21 earlier, the National Remedy Review Board, which is a high
22 level management group at EPA, has, after careful review,
23 recommended to the agency that the phased approach be used to
24 periodic cleanup in the Coeur d'Alene Basin.

25 The National Remedy Review Board, Your Honor,

1 basically said there were three fundamental issues at the site:
2 One, there was an extensive amount of contamination at the
3 site; two, there were very significant technical uncertainties
4 associated with the site; and three, there were very
5 significant cost implications at the site. And based on those
6 three fundamental factors, the National Remedy Review Board
7 recommended back to EPA that instead of implementing a
8 comprehensive remedy, the agency instead should go forward with
9 a phased approach.

10 In addition to the recommendations of the National
11 Remedy Review Board, the National Research Council, the arm of
12 the National Academy of Sciences, has also opined on the site
13 and expressed serious concerns about the feasibility and
14 effectiveness of implementing a long-term remedy, or even
15 components of the interim remedy that have been proposed by EPA
16 for the site.

17 And finally, as the whole body of technical evidence
18 visibly, vividly shows, there are huge and very significant
19 technical absurdities associated with proceeding forward with a
20 either interim or comprehensive remedy at the Coeur d'Alene
21 site. Many key technical problems confront a remedy of the
22 scope asserted by the Government, and these issues have not
23 been anywhere near yet resolved.

24 For example, while we know what kind of cleanup
25 standards, or as the Government referred to, the ARAR standards

1 need to be used there. The EPA itself has shown in their
2 documents that it will take at least 250 to 800 years to
3 achieve compliance with these cleanup goals. These issues
4 themselves present substantial uncertainties. And in fact, in
5 a real, in a real world, these ARAR standards are often waived
6 at various points as the cleanup projects go forward.

7 So it's unclear yet what will happen with these
8 cleanup standards. Will they indeed be waived, or will they
9 not indeed be waived? No one really knows actually what to do.
10 And we will have to wait many years, 30 years, or perhaps even
11 longer, to see what should be done next.

12 The EPA's proposed cleanup remedy also raises a
13 number of important technical issues that the NRC specifically
14 highlighted, the National Research Council. For example, we
15 can conservatively say that the type or volume of material that
16 EPA would want excavated under the comprehensive remedy would
17 require 2.2 million truck loads of trips to accomplish and
18 would fill this courthouse completely 100 times over.

19 Even the State of Idaho, in reviewing the original
20 EPA cleanup remedy, expressed significant concerns about how
21 the interim remedy would disrupt and affect the local community
22 there. And while they concurred in the remedy, they did have
23 reservations about how that remedy will be implemented.

24 You will hear testimony in this case finally about
25 repositories. Your Honor, one of the key technical issues is

1 if this material is excavated and removed, where will we put
2 the millions of cubic yards of material that needs to be hauled
3 off the site? And the agency's plan is to put it into
4 repositories down in the Coeur d'Alene area.

5 During our discovery period, we learned that there
6 will be a need for many repositories to handle the millions of
7 cubic yards of material to be dredged, yet no sites have been
8 selected. And the agency has said there will no doubt be many
9 difficulties, whether because of what we call NIMBY concerns,
10 not-in-my-backyard concerns, or just plain feasibility concerns
11 in getting satisfactory locations to put the materials.

12 For the two components of the remedy, there is a need
13 to, when the human health remedy is implemented, there will be
14 a need to dispose of the contaminated material in various
15 repositories. Right now, as this document, as this figure
16 shows, approximately six additional repositories are going to
17 be needed to handle the human health material. Yet right now
18 there's only one repository in place. That is the Big Creek
19 repository. The second repository, East Mission Flats, is only
20 in the 30 percent design phase. And in fact, the agency, in
21 issuing a report on the 30 percent design phase, has
22 specifically itself noted, there are going to be very
23 substantial problems in siting and building these repositories.
24 For the ecological remedy, the actual cleanup of the
25 contaminated sediments in the basin per se, no repository sites

1 have yet been identified, and none has been selected.

2 As to the other key issues in the case, the second
3 key issue remaining is the natural resource damages. And the
4 Counsel for the Government has laid out the predicate for the
5 natural resource damage claim. ASARCO has already paid to the
6 State of Idaho and the Tribe \$4.8 million to settle already
7 existing natural resource damage claims. And in fact, ASARCO
8 is planning to make one, an additional \$1 million payment to
9 the Tribe in the near future.

10 As the Government has noted, there are three basic
11 injury claims that have made, have been made for natural
12 resource damages, aquatic resources, injured federal lands and
13 tundra swans. We basically believe that the Government's claim
14 is faulty, for three fundamental reasons. We disagree with the
15 Government on the calculation of the baseline conditions
16 against which injuries have to be measured. We also disagree
17 with the Government that they have overstated the amount of
18 injuries that actually have been incurred in the basin. And
19 finally, Your Honor, we disagree with the Government on the
20 damages. We believe the Government, under the law, is required
21 to choose the most cost effective approach, and they have
22 failed to do so in this case.

23 In fact, as we've reviewed the Government's
24 affirmative reports, we have witnessed constant changes up in
25 their claim as they've modified their position. For example,

1 as the Government has submitted affirmative and rebuttal
2 reports, we are now seeing new claims for natural resource
3 damages that were not in the original Government's claim filed
4 with their proof of claim. There are two notable examples of
5 this. One is a claim for a \$40.7 million repository cell that
6 was never originally included in any of the Government's
7 initial proof of claim. This cell is going to be constructed
8 to handle the materials that are generated from the excavation,
9 yet the Government now is insisting that there is a natural
10 resource damage claim associated with building the cell that's
11 going to handle the waste in the first place.

12 Second, just recently, in the Government's recent
13 papers, we have found just new data within the last couple of
14 weeks that show there's been an improvement in the fish
15 conditions in Canyon Creek, in the basin. We have seen, Your
16 Honor, increases in fish resources in Canyon Creek. Yet the
17 Government has now said, because we have more fish resources in
18 Canyon Creek, we have a worse problem than we had before. The
19 more we get data, Your Honor, that shows improvement, the more
20 the Government is telling us we have more damages.

21 The third key issue remaining is the indirect cost
22 issue. And as has been discussed already this morning, Your
23 Honor, the Government's claim is for \$515 million. And as
24 Mr. Davis has pointed out, this is a claim for overhead costs,
25 includes computer services, utilities, et cetera. We believe

1 that the Government's claim is faulty, for two fundamental
2 reasons. First, when there is a PRP available to do the work,
3 we believe, Your Honor, under the law, that the Government
4 cannot impose an indirect cost on us. And the second key
5 reason we think that this claim is faulty is because of the
6 fact that the claim for indirect costs is estimated to
7 extrapolate out for the next 40 years. We do not believe that
8 the Superfund program will remain at the same level of funding,
9 or same level of support 40 years out in the future as it is
10 today; and therefore, the Government does not have the
11 authority to impose the same kind of indirect costs on the site
12 in the future as they do today.

13 A couple of the other key remaining issues are the
14 discount rates, and this issue has been substantially litigated
15 before you, Your Honor. And essentially, the EPA/OMB guidance
16 provides 7 percent real discount rate. These are the rates
17 that are generally used in EPA's records of decisions. And in
18 fact, the 7 percent rate is specifically included in the
19 Interim ROD for this site as well.

20 And the fifth and final issue is the base year issue.
21 As has been addressed at other sites, Your Honor, we believe
22 that the proposed base year of 2006 is the correct base year,
23 and the Government has proposed the year 2008.

24 So in sum, until this bankruptcy proceeding, there
25 had been no indication at all by the agency of any change in

1 course, from the prudent direction that had been set forth
2 previously in the Interim ROD decision. That has changed. In
3 fact, we have not seen, even in the agency's most recent
4 five-year review report, any indication at all that the agency
5 was proposing a comprehensive remedy. We believe, Your Honor,
6 the prudent course is to continue on with the current study
7 state the agency has proposed and continue to clean up the site
8 for 30 years, as recommended under the Interim ROD.

9 Your Honor, in closing, we plan to call four
10 witnesses during this hearing. They are Mr. Chris Pfahl, who
11 will give instruction to site and the historical mining and
12 milling operations in the basin, and ASARCO's prior involvement
13 at the site. We also plan to call Mr. James Chadwick, who will
14 testify to the aquatic injuries and the appropriate baseline
15 conditions at the site; Mr. Rick White, who will opine on
16 natural resource damages, discount rates and inflation rates.
17 And finally, Mr. Jeff Zelikson will testify on the cleanup
18 issues and associated costs. Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. JORDAN: Your Honor, I have only a few comments
21 to address that were related to but distinct from what I
22 believe has been addressed already. It deals, first of all,
23 with the proof of claim that's filed -- for the first time, I
24 think, today we hear the Government is backing off of its proof
25 of claim. But I would like to point out for the Court what we

1 have been faced with in dealing with the Government's claim
2 that's on file.

3 First of all, I've handed the Court a copy of the
4 Coeur d'Alene versus ASARCO opinion of Judge Lodge. For the
5 benefit of Counsel, there are highlighted portions. Everyone
6 has colored copies, so everyone has the highlighted portions.

7 What's important to note, Your Honor, is that when we
8 were faced initially with this estimation proceeding, if you
9 look at the demonstrative that's attached, the reddish version
10 is Judge Lodge's opinion that really gives us 22 percent of
11 100 percent of the liability, which of course, if you'll
12 notice, the Government's, both Counsel said we have no issue of
13 liability. They like the Judge Lodge opinion when it comes to
14 liability, but they back away, and apparently they're going to
15 try and convince you that on appeal Judge Lodge is going to be
16 reversed. So they don't like his opinion when it comes to the
17 22 percent divisibility.

18 If you'll notice, if you follow the green
19 re-inclusions into the Box for ASARCO, where we were, based on
20 an opinion of a 78-day trial, 6,000 exhibits, 18,000 pages of
21 transcript, and 45-page opinion, which I've furnished the
22 Court, we were 22 percent divisible. We are now, have been
23 given, under the proof of claim filed by the DOJ, all of
24 Hecla's portions, everybody else's portions, the orphan's share
25 portions, and indirect costs, as well as, if it's, if the claim

1 is, if I read the claim correctly, a supervisory charge. So we
2 are back to funding the entire cleanup for the entire basin.

3 I want to address one other issue, which is, I guess,
4 closest to my participation in these proceedings, and that's
5 been the discount rate, Your Honor.

6 THE COURT: Well, you would agree that there is the
7 possibility, absent this bankruptcy, that you would be charged
8 with 100 percent of the cleanup.

9 MR. JORDAN: Well, I agree with your analysis that
10 you have -- Judge Lodge's opinion is not final law.

11 THE COURT: Right.

12 MR. JORDAN: You're not bound by it. You're going to
13 have to weigh your own thoughts and --

14 THE COURT: Right.

15 MR. JORDAN: So I certainly don't object to the
16 Government telling us why Judge Lodge was wrong, and I assume
17 you'll hear us when we tell you why he was right. But you do
18 have to make that decision.

19 THE COURT: Right.

20 MR. JORDAN: That is part of the estimation process,
21 and actually I've heard you address it in that fashion before
22 in respect to Tacoma.

23 Your Honor, let me address, though, the single issue
24 that's I think most dramatically evident in Coeur d'Alene, and
25 that is this change that Mr. Steinway walked you through from

1 the handling of this claim, up through the filing of the proof
2 of claim, other than the liability, because the proof of claim
3 that we had dealt with had the actual remedy as an unestimated.

4 And for the purpose of this, when the Academy and the
5 Review Board and the EPA all were in sync, it was a 35-year
6 study, still a very expensive study, but a 35-year study, and
7 then a decision in the future as to whether or not there could
8 be any such recovery, such as the \$2 billion suggestion that is
9 before the Court today, 100 percent of that number.

10 And what has happened to us is this. After the
11 estimation proceeding was filed, after all of the positions
12 that we ever understood were, was fairly certain, a process
13 that would require, as opposed to dredging the entire basin and
14 displacing all of the, all of the ecology and replacing it and
15 watching it grow, that there would be a process of 35 years to
16 study especially the impact of what was being done, what was
17 thought would be right, and then what did technology do in the
18 35 years that would help us do something other than dredge the
19 basin and displace the entire process for years and years.

20 And I suggest this, is that there is a factor, and
21 that this is purely a mathematical factor. If the original
22 claim, if the Academy is right, if the Review Board is right,
23 that we should do 35 years worth of expensive study, but not
24 billions, and then decide at that point what to do, which could
25 be billions, you could find that then it's owed, that then you

1 net present value that, you reach a substantially different
2 number than if the position now taken, which only came after
3 estimation, that let's start tomorrow, let's ignore what we
4 have been told by the Academy, what we have suggested, what we
5 have dealt with in dealing with the State of Idaho -- which you
6 notice, you said they weren't here. They do have a distinct
7 position on whether they want the entire basin dredged and
8 everyone displaced for years and years and years, in order to
9 ultimately come up with a solution that will be final and
10 complete 250 years from now. And that process, Your Honor, the
11 discount rate is a driver in this case.

12 If we start tomorrow, they eliminate the discount
13 rate. Judge, we're going to start tomorrow, and it will take
14 the next 35 years, but we're going to have the big bulk of the
15 claim allowed at this point. If we do what we said before we
16 came into bankruptcy and before we decided the estimation
17 proceeding would have a discount rate applied to it, it is
18 substantially different. If we wait 35 years, if we then put
19 the funds, whatever you determine the claim actually is, into
20 play at that point in time, but we bring it back to current
21 dollars, the difference is dramatic, and the difference would
22 be dramatic in current dollars.

23 And for this reason, is to me most important. When
24 you approve a claim, however you decide, however you weight the
25 relative importance of their remedies versus the remedies that

1 we believe are so much more practical, usable, when you do
2 that, you don't allow a proof of claim and restrict them to,
3 "Now, you said you were going to start tomorrow. You start
4 tomorrow." You don't say, "You have to spend this money."
5 Because what happens is they get a claim, then they process
6 this in the future, and they may decide the very next day after
7 the claim is allowed to start 35 years in the future. Were
8 that true, if that were to occur, 35 years in the future this
9 fund would be four or five times larger and would effect, would
10 be in effect an allowance of a claim which would be far greater
11 than is even required to do the cleanup.

12 So I think it's important when you analyze what has
13 happened since the filing of the claim, today is the remarks
14 that they'll try to convince you on appeal, but they're not
15 arguing about the 22 percent.

16 THE COURT: Okay. What about the possibility that, I
17 mean, this is such a difference in approach that, I mean, the
18 concept of estimation is not supposed to have anything to do
19 with bankruptcy. And I say that, understanding that that
20 doesn't make any sense, except for the fact that -- in other
21 words, I am not supposed to estimate this on what's a
22 reasonable amount that they can pay and still reorganize.
23 We're not -- that's not in the picture.

24 MR. JORDAN: Of course. That's right.

25 THE COURT: However, in bankruptcy, you could propose

1 a possibility whereby you pay for the 35 years of studying, and
2 then when it comes in 35 years from now, you're responsible for
3 100 percent of whatever the ultimate thing comes out. And down
4 the road, I mean, it may well be -- in other words, this is one
5 of those areas where if the possibility -- I mean, I think the
6 Code requires that I just charge you for your reasonable claim
7 today, as of the date of filing. And, but on the other hand,
8 it may well be that an approach that provides a more
9 practical -- but that's all a part of the plan process. And I
10 don't know that I can look at any of that to look at evaluating
11 this claim.

12 MR. JORDAN: And the answer is, from our perspective,
13 and I think from DOJ's perspective, because we could both make
14 some pretty unique arguments, if it were, you were allowed to
15 do that, is 502 tells you that you have to liquidate claims
16 which cannot be liquidated within a reasonable time to avoid
17 confirmation as of the petition date. You've got to come up
18 with a number --

19 THE COURT: Okay.

20 MR. JORDAN: -- then we get to manipulate the plan,
21 they get to manipulate the request, we negotiate how it's going
22 to be paid.

23 THE COURT: Well, I mean, they have -- I mean
24 ultimately, they have the right to object to plan, and they
25 have the right --

1 MR. JORDAN: Sure.

2 THE COURT: -- to object to their treatment, too.

3 MR. JORDAN: Yes.

4 THE COURT: Once this is all done. So, okay. Go
5 ahead.

6 MR. JORDAN: Yeah, but you're sort of stuck, Your
7 Honor, with having to come to the conclusion of what's the
8 claim worth on the petition date.

9 THE COURT: Okay.

10 MR. JORDAN: And I only suggest this, that it's
11 worth -- there are two things that are important. One is that
12 it is worth what the merits say it's worth, and that's going to
13 be your call.

14 THE COURT: Okay.

15 MR. JORDAN: The second is it's worth what it's worth
16 over the right time. And that is strongly driven by the
17 discount rate, not just the distinctions between the ones we've
18 made, the 7 percent versus the 2½ percent, which is the range
19 in which you're arguing, you're working with in this particular
20 case, or whatever range you come up with, but it's the fact
21 that it is time driven, such that to make a distinction or to
22 make a decision in a bankruptcy case to accelerate your claim,
23 distinct from what we believe is reasonable, is a very
24 important ingredient to what we're asking the Court to consider
25 in this particular case. Thank you.

1 THE COURT: Okay. Oh, the Parent wanted to say
2 something.

3 MR. EVANS: Yes, Your Honor. Good morning. Gregory
4 Evans on behalf of ASARCO, Incorporated. A few quick points.
5 Our role in this proceeding will be to assist the Court,
6 although it's an adversarial proceeding, but to provide an
7 expert witness, Dr. William Desvousges, who is a Ph.D.
8 economist, who has always specialized in natural resource
9 damage assessments and has in fact assisted the EPA and written
10 materials for training with EPA regarding the proper way to
11 assess natural resource damages.

12 To orient the Court to the evidence that will be
13 coming before it regarding the NRD claim, I think it's been
14 said, but not perhaps in this way, that there are three
15 elements that the Court will need to kind of review in
16 determining the merits of the NRD claim: The terrestrial, the
17 aquatic, and one, one bird that has been determined to have
18 been harmed by the District Court. So you have land, you have
19 water, and you have the tundra swan.

20 The evidence that will, I think, come before the
21 Court, Your Honor, the unequivocal position taken, I think, by
22 the Government in the District Court proceeding before Judge
23 Lodge regarding water is that they selected a control, and the
24 control they selected was consistent with the Code of Federal
25 Regulations. You will hear Dr. Desvousges explain, and he'll

1 be available to answer questions regarding how the Code of
2 Federal Regulations dealing with NRD assessment apply.

3 In selecting a control for the water assessment in
4 the District Court action, the United States Trustee selected
5 the St. Regis River. Now they select an upper portion of the
6 river that's affected because that has the effect of driving up
7 the damages, the baseline, and therefore the damages in this
8 case.

9 You will hear evidence that the best control is the
10 St. Regis, the same control the Government used in the District
11 Court. And that, and we would urge the Court to reject any
12 effort to try and move that around or move that target during
13 this proceeding for purposes of increasing the amount that the
14 Court is asked to estimate.

15 You heard a little bit about trout. You'll hear more
16 about trout by Dr. Chadwick and both by Dr. Desvousges. The
17 issue there, Your Honor, that you're going to hear about is
18 that just in the last week, they went out and they found more
19 trout in a river that they have asserted is barren and would
20 remain barren for a long period of time. This improvement
21 results in evidence to show that there has been improvement
22 occurring, and that should be taken into account in this
23 estimation. Instead, again, moving the target and much like
24 the St. Regis River, which they reject, they now reject their
25 previous baseline. And you'll hear evidence that the baseline

1 should be changed in accord with the newly found trout.

2 Regarding the swan, you'll hear evidence that the
3 Government, through its process, came up with some
4 alternatives. And one of the alternatives that the Government
5 now rejects is conservation easements with some revegetation.
6 They're rejecting that as not feasible at the moment, even
7 though in the previous proceedings that was deemed something
8 appropriate by the EPA. Look closely at that, Your Honor.
9 Consider whether or not this position has changed, like the
10 trout, like the St. Regis River, for purposes of increasing the
11 claim.

12 And finally, the terrestrial issue, that is the land,
13 the federal lands. You'll hear that term used interchangeably,
14 terrestrial and federal lands. Dr. Desvousges will testify as
15 an NRD economist as to how the cost benefit analysis that is
16 required by the Code of Federal Regulations applies here to
17 result in a more fair and a more appropriate estimation as to
18 the damages to the land.

19 Finally, I think a lot of attention has been devoted
20 this morning, Your Honor, to the Burlington Northern case, the
21 Ninth Circuit case, the finding of Judge Lodge, and the issue
22 of 22 percent allocation. Two quick points on that. I think
23 it's very telling that the Government has not indicated to the
24 Court that it is going to bring evidence before it to establish
25 that this is not a claim that should be apportioned consistent

1 with either the holding in Bell Petroleum or the holding in the
2 Burlington Northern case, which they claim will cause the Ninth
3 Circuit, they speculate will cause the Ninth Circuit to
4 overturn the case.

5 I want to just -- this will all be briefed, I'm sure,
6 and the Court has already been briefed on this issue, but I do
7 want to point out to the Court that the case that the
8 Government is relying on now trying to get you to assign some
9 probability of success to their claim that an appeal which
10 doesn't exist now may be filed and may end up overturning the
11 District Court's decision, reported decision, which finds the
12 22 percent in this case, the language from the case that they
13 rely upon, the Burlington Northern case, says, and I quote, "In
14 line with every Circuit that has addressed this issue, we hold
15 that apportionment is available." That apportionment is
16 available. They go on to hold, "We agree that apportionment
17 can be appropriate under CERCLA."

18 And no one's focusing you really on the underlying
19 case that they claim is going to vanquish Judge Lodge's
20 decision. Your Honor, I was the lawyer in the underlying case,
21 the Brown & Bryant case, that has resulted in the Burlington
22 Northern reported decision by the Ninth Circuit. I was the
23 lawyer who went onto the property and understood the
24 differences that led the District Court and led the Ninth
25 Circuit to decide as it has.

1 And the reason that the Court says in its case, in
2 its reported decision, the Ninth Circuit says that it cannot
3 apportion in that case is because you had a lessor, a lessee, a
4 partial lessee. You had a generator and you had a transporter,
5 all dealing with chemicals that ended up causing contamination
6 on the land. And under CERCLA, all of those parties were
7 treated as if they had caused the harm. And that's why it was
8 so difficult for the Court to apply the concept of several
9 liability in that case.

10 And that is not at all the case we have here. We
11 have mining companies using the same materials to generate the
12 same ore, to generate the same minerals that are used and the
13 same metals that are used. And for that reason, this case is
14 eminently, eminently a great candidate for apportionment, just
15 as Judge Lodge decided it was.

16 So, Your Honor, don't be distracted by the
17 Government's claim that this 22 percent finding is something
18 that this Court should not rely upon. It is the law of the
19 case. It is the finding of the District Court. And it should
20 be the finding of this Court. Thank you, Your Honor.

21 THE COURT: All right. Could we have a picture, that
22 picture of the basins, just to kind of orient me? As I recall,
23 when I was in the Air Force, I drove over from Spokane to
24 Coeur d'Alene. So where would I have gone? If I went straight
25 over to the -- isn't there a park or, you know, the lake, or

1 where -- is there a town? Or where is that on --

2 UNIDENTIFIED SPEAKER: You would have been just east
3 of the dotted line, dashed line.

4 THE COURT: It would have been --

5 UNIDENTIFIED SPEAKER: On the very left-hand side.

6 THE COURT: Can you point to where it would be? Is
7 it on this chart?

8 UNIDENTIFIED SPEAKER: Yeah. Well, it's --

9 THE COURT: Somewhere in there, along the lake?

10 UNIDENTIFIED SPEAKER: Very left-hand side of that,
11 there's a small dash line.

12 THE COURT: Right in there is where the town of
13 Coeur d'Alene is?

14 UNIDENTIFIED SPEAKER: Yes.

15 THE COURT: Okay. Thank you.

16 MR. TENENBAUM: Briefly, Your Honor, by way of reply
17 very briefly.

18 THE COURT: Oh, sure.

19 MR. TENENBAUM: Thank you. I just wanted to clarify
20 the record with respect to one of Mr. Davis's exhibits. He had
21 a column on there for the United States proof of claim and an
22 amount on there. I'm not sure it was clear, though. But
23 Mr. Steinway later did clarify that in fact the United States'
24 proof of claim does have and fully asserts a claim for future
25 comprehensive remedy. It was just filed as an unliquidated

1 amount. So that's why it didn't appear in those numbers.

2 THE COURT: Correct.

3 MR. TENENBAUM: Same thing for the indirect cost
4 figures. That was asserted in our proof of claim, but as a
5 unliquidated number. In accordance with the Case Management
6 Order here, we liquidated those for purposes of the estimation
7 hearing.

8 With respect to Mr. Steinway's contention that we're
9 seeking a claim for a remedy that's not yet been selected,
10 well, you know, this is an estimation hearing, so we are, the
11 whole point of it is to estimate what's going to happen in the
12 future.

13 With respect to Mr. Jordan's comments on discount
14 rate, well, first of all, I would point out that technically
15 it's our view that there really shouldn't be any discount rate
16 at all because the Debtor was liable as of the petition date to
17 do the full cleanup. So there really shouldn't be any discount
18 rate at all.

19 As a matter of compromise and trying to hopefully
20 reach a settlement, which didn't happen here, we did do and did
21 take the position that we're willing to have a discount rate in
22 accordance with the rate that the Government earns on
23 Government securities, based on when the payment would be
24 expected to be made in 2008, but that's very much a compromise
25 position. If we're going to have to disagree on this issue,

1 then you know, then I think that we have to consider whether
2 there should be any discount rate at all.

3 And I would agree with Your Honor that this may well
4 be a plan issue, because we have asbestos creditors in this
5 case. The Debtor's expert for the asbestos, in the asbestos
6 creditors' matter takes a totally inconsistent position with
7 their position here. They argue for a discount rate much
8 closer to what we were suggesting in our compromise approach.
9 So you can't have it both ways. I don't know why, you know, I
10 don't know what their explanation is. I didn't hear any
11 response from Mr. Jordan on that point.

12 You know, it really would be truly unfair to discount
13 the value of the claim based on an interest rate, presumed
14 interest rate that the Government by law cannot earn, because
15 it's put into the Treasury.

16 And we also have in this case, not just the asbestos
17 creditors, you also have bondholders. Now, I have not examined
18 the terms of the various bonds in this case, but it is common
19 in some bankruptcy cases that there are bonds that would, in
20 the ordinary course of things, if there hadn't been a
21 bankruptcy, they would have been paid out over 20, 30 years
22 into the future. However, there's a term in the bonds that
23 accelerates the debt in the event of either default or maybe
24 even bankruptcy. I don't know what they might say. Well, you
25 know, there's a fairness and a consistency issue there. I

1 mean, if those claims would have been paid out over 30 years,
2 and the Bankruptcy Court is going to value them without any
3 discount for that, then maybe again we should have the same
4 treatment, especially since the Debtor was liable, as of the
5 petition date, for the full cleanup.

6 Lastly, with respect to Mr. Evans' point about
7 allocation, he said that we're not submitting any evidence.
8 I'd like to correct that. We do have in the record exhibits
9 that were testimony from the Idaho trial. That is being
10 admitted into evidence as an exhibit here. And so there is
11 evidence on that in the record.

12 THE COURT: Okay. Thank you.

13 MR. TENENBAUM: Thank you.

14 THE COURT: All right. Are we ready to proceed?
15 Ready to call your first witness? I have a book of all of the
16 proffers, and I don't really have it updated, but we'll do it
17 as we go long. So if we can make sure we know who's being
18 called and what their current, I have their current proffer, it
19 would be a good idea.

20 MS. MACDONALD: The first witness, Your Honor, will
21 be Cami Grandinetti. And --

22 THE COURT: Cami Grandinetti, which is Proffer
23 Number 12.

24 MS. MACDONALD: Proffer Number 12, correct.

25 CAMI GRANDINETTI, GOVERNMENT'S WITNESS NO. 1, SWORN

1 DIRECT EXAMINATION

2 BY MS. MACDONALD:

3 Q. Ms. Grandinetti, could you state and spell your name for
4 the record.

5 A. My name is Cami Grandinetti. C-A-M-I,
6 G-R-A-N-D-I-N-E-T-T-I.

7 Q. And could you just describe your background, your
8 education, professional experience?

9 A. Yes. I have a bachelor of science in civil engineering.
10 I have a master of science in civil engineering. I am a
11 Registered Professional Civil Engineer in the State of
12 Washington. And I currently work for the Environmental
13 Protection Agency.

14 I started working for EPA in 1993 as a remedial project
15 manager in the Superfund program. A remedial project manager
16 has the direct line technical responsibility for overseeing
17 investigation and cleanup of hazardous waste sites.

18 In 1996 I began working on the Bunker Hill site in the
19 Box, which Mr. Steinway talked about earlier. And I have been
20 involved in the Coeur d'Alene project since that time.

21 Currently, I manage a unit of people who, a unit of
22 remedial project managers, a group of whom in that unit work on
23 the Coeur d'Alene Basin. There are six full-time remedial
24 project managers working on the project right now, two
25 part-time remedial project managers, two part-time community

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1 liaison professionals, one part-time risk assessor, and one
2 part-time chemical lab analysis professional.

3 Q. And have you spent a lot of time in the Coeur d'Alene
4 region?

5 A. Yes. Originally, I was born and raised in Spokane,
6 Washington, which is about 30 miles west of the city of
7 Coeur d'Alene. My grandmother is originally from the city of
8 Kellogg, which is where the smelter was. She was born and
9 raised there. And then when I was working on this project from
10 2001 to 2003, I lived in Spokane. I was working on this
11 project and then another one in Central Washington.

12 Q. Now I'd like to direct the Court's attention and you --

13 THE COURT: Okay. Let me just ask, when you said
14 they were part time, they have full-time jobs, they just --

15 THE WITNESS: They do.

16 THE COURT: -- this is part of what they do?

17 THE WITNESS: This is just part of what they do.

18 THE COURT: Okay. I didn't know whether they had
19 some sort of -- go ahead.

20 BY MS. MACDONALD:

21 Q. And now what I would like to do is just walk through a
22 slide presentation that we have to orient the Court.

23 THE COURT: Can you see it? You can see it right
24 there in front of you, can't you?

25 THE WITNESS: I can see it here, yes.

1 THE COURT: Okay, good.

2 BY MS. MACDONALD:

3 Q. If we could go to the first slide. This is another map of
4 the basin. And if you could just kind of describe where the
5 site is. And as a point of reference, if you could show where
6 Spokane is, since --

7 A. Yes. I'll try and --

8 Q. -- Honorable Judge Schmidt is aware of where that is.

9 THE COURT: If I had just waited, I wouldn't need to
10 have asked the question.

11 MS. MACDONALD: That's fine.

12 THE WITNESS: It's hard for me to do this from here.
13 Okay. So the city of Spokane is right there. The
14 Coeur d'Alene Basin, as Mr. Steinway also discussed -- I think
15 I've messed this up now. What I want to point out here is the
16 State of Montana is on the right-hand side. This, the
17 Bitterroot Mountains separate Idaho from Montana. The
18 Coeur d'Alene Basin watershed runs from -- this is the South
19 Fork Coeur d'Alene River. This area right here is what I'll
20 refer to as the Upper Basin. This gray area right here is what
21 we call the Bunker Hill Box. The Lower Basin starts on the
22 left-hand side of the Box. The main stem Coeur d'Alene River
23 flows through here. Coeur d'Alene Lake area is right here.
24 The city of Coeur d'Alene is right at the top of the lake, and
25 then the Spokane River flows out of the lake and into the city

1 of Spokane, and then ultimately to the Coeur d'Alene, or the
2 Columbia River rather.

3 Q. And where did the contamination come from?

4 A. The Mining District is what is located in the Upper Basin
5 area. So all of the mining took place in this location up
6 here.

7 Q. Could we go to the next slide?

8 A. So as we've talked about, the Coeur d'Alene Mining
9 District was a rich Mining District. There were several
10 operating mines over the years, and the basin was impacted by
11 more than 100 years of mining. Historically, mine waste, mine
12 tailings, the by-product of separating the precious ore from
13 the waste, all of that mine waste was discharged to the river
14 and the creeks and the tributaries.

15 The Upper Basin is a pretty mountainous region. There's
16 not a lot of flat land. And so it was pretty convenient to
17 discharge to the creeks and the rivers. And the creeks and the
18 rivers took the material away.

19 In 1968 the mining companies began impounding the mine
20 waste, and so there are several large impoundments located in
21 the Upper Basin that now contain historic mine waste. And most
22 of those piles are also located very near the creeks and
23 streams, because there isn't a lot of flat land up there.

24 Over time it's estimated that more than 100 million tons
25 of mine waste has been discharged to the whole watershed,

1 including a lot of lead. 2.4 billion pounds of lead is
2 estimated, and it's covered thousands of acres.

3 Q. And, if you go to the next slide, if you could describe
4 the types of contaminants that you find in this contamination
5 that you've been describing.

6 A. The hard rock mining in this area was for precious metals,
7 lead cadmium, or lead, zinc, silver primarily. But by-products
8 of those are in the earth. And so you have a suite of metals
9 that are listed here in soil, sediment, ground water and
10 surface water throughout the basin. What I will focus on
11 primarily today are lead and zinc.

12 Q. And can you describe for the Court how the contamination
13 moves around?

14 A. Yes.

15 Q. Next slide.

16 A. So the, what we call the fate and transport of
17 contaminants. Once the tailings and mine waste was discharged
18 into the creeks and streams, it was readily transported
19 downstream. The Upper Basin is a pretty steep gradient, fast
20 flowing river environment, and so the mine waste was readily
21 carried. As it was carried down over, down through the Upper
22 Basin and then into the Lower Basin, it became deposited as
23 layers and sediment mixtures in the beds, banks, and flood
24 plain areas of the entire watershed.

25 Finer grain materials can move more readily than heavier